

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

WILLIAM ORTA JR.,
Respondent.

No. 2 CA-CR 2016-0223-PR
Filed July 18, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Yuma County
No. S1400CR200400864
The Honorable John Paul Plante, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jon R. Smith, Yuma County Attorney
By Karolyn Kaczorowski, Deputy County Attorney, Yuma
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 The state seeks review of the trial court's order granting William Orta Jr. a new trial, pursuant to Rule 32.1(e), Ariz. R. Crim. P., based on newly discovered evidence, specifically a recantation by a trial witness. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). The state has not sustained its burden of establishing such abuse here.

¶2 After a jury trial, Orta was convicted of child molestation and engaging in sexual conduct with a minor under the age of twelve. The trial court sentenced him to a mitigated, ten-year term of imprisonment on the molestation count and a life term without the possibility of parole for thirty-five years on the sexual-conduct count, to be served consecutively. The convictions and sentences were affirmed on appeal. *State v. Orta*, No. 1 CA-CR 08-0191 (Ariz. App. Jan. 26, 2010) (mem. decision).

¶3 Orta thereafter sought post-conviction relief, arguing he had received ineffective assistance of counsel and was entitled to relief based on newly discovered evidence, specifically a recantation by a witness, S.C. The trial court denied relief, but this court granted relief on review of that decision. *State v. Orta*, No. 2 CA-CR 2014-0100-PR (Ariz. App. June 17, 2014) (mem. decision). We concluded the trial court had misapplied the law relating to newly discovered evidence and recanted testimony and remanded the matter to the trial court for it to determine if a new trial was appropriate. *Id.* ¶ 12.

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¶4 On remand, the trial court held a hearing at which the state presented additional evidence and argued S.C.'s recent statements did not qualify as recanted testimony because they were consistent with her testimony at trial and would not have changed the verdict, and because S.C. was not a credible witness. The trial court concluded S.C.'s statements constituted newly discovered evidence entitling Orta to relief and ordered a new trial.

¶5 On review, the state maintains the trial court abused its discretion in granting Orta a new trial because he "knew during trial that S.C. had recanted her statement to police." It asserts relief based on newly discovered evidence is not appropriate "when a Defendant knows about the evidence before trial." In support of this proposition, the state cites cases dealing with newly discovered evidence other than recanted testimony. *See State v. Mauro*, 159 Ariz. 186, 207, 766 P.2d 59, 80 (1988); *State v. Jeffers*, 135 Ariz. 404, 426, 661 P.2d 1105, 1127 (1983); *State v. Saenz*, 197 Ariz. 487, ¶¶ 12-13, 4 P.3d 1030, 1033 (App. 2000). As we indicated in our previous memorandum decision, although a defendant may be aware of a witness's dishonesty, it is often difficult to compel a recantation. *See Pacheco v. Artuz*, 193 F. Supp. 2d 756, 761 (S.D.N.Y. 2002) ("In many cases, no amount of due diligence on the part of a petitioner can compel a witness to come forward and admit to prevaricated testimony"); *Cammarano v. State*, 602 So. 2d 1369, 1371 (Fla. Dist. Ct. App. 1992) ("Without [the witness's] cooperation, any prior interviews with him would not have brought forth his recantation, however diligently his interviewer questioned him."). Thus, we have recognized that recanted testimony may qualify as newly discovered evidence, even though it does not always squarely fit the definition for such evidence. *See State v. Hickie*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982).

¶6 The state contends, however, that the trial court abused its discretion by concluding the evidence here qualified as newly discovered because it erroneously found S.C. had told an investigating detective before trial that the victim had told her she hated Orta and wanted him out of her house. And it further argues that S.C. recanted her original story at trial when she testified the victim had told her she hated Orta and wanted him out of her house.

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But, although the transcript of S.C.'s interview with the detective shows S.C. had denied making a statement that included the assertion that the victim hated Orta, she also said the victim had described Orta as her "stepdad that hit my mom" and had told her about a domestic violence incident involving Orta and her mother. The detective questioned S.C. broadly as to whether the victim had recanted to S.C. directly at all, not exclusively on whether the victim had made the statement about her feelings toward Orta. And it was the question of whether the victim had recanted to her directly on which S.C. persisted in her original answer until the Rule 32 proceeding.

¶7 At the evidentiary hearing, S.C. testified she had not told an investigating detective that the victim had told her directly that she had lied about Orta's abuse. And Orta's trial counsel testified at the hearing that S.C. had been "firm" in her statements on that point. Even accepting that S.C. changed her story in part at trial, or that evidence that she had lied was known to the parties, her account as Orta presented it to the trial court in his Rule 32 proceeding was markedly different from that presented at trial.

¶8 Such a recantation in testimony may qualify as newly discovered evidence. *Hickle*, 133 Ariz. at 238, 650 P.2d at 1220. And, the trial court is "in the best position to evaluate its credibility and effect." *Id.* Our review of the trial court's factual findings related to the hearing "is limited to a determination of whether those findings are clearly erroneous." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* In this case, we cannot say the court has abused its discretion in determining that the recanted testimony probably would have changed the verdict, and we therefore will not disturb its decision.

¶9 Although we grant the petition for review, we deny relief.